



The following constitutes
the order of the court. Signed January 22, 2013

M. Elaine Hammond

M. Elaine Hammond
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
WILLIAM EDGAR DAVIS,

Case No. 10-74245 MEH
Chapter 7

Debtor/

ZELMA STENNIS AND
KEVIN STENNIS,

Adv. No. 11-04066 AH

Plaintiffs

v.

WILLIAM EDGAR DAVIS,

Defendant/

AMENDED MEMORANDUM DECISION

On September 10, 2012 the court held a hearing on the motions for summary judgment filed by each party on August 8, 2012. Subsequently, the court issued its Memorandum Decision granting Plaintiffs' motion for partial summary judgment in part and denying it in part and denying Defendant's motion for summary judgment (docket no. 143). The Memorandum Decision, issued October 12, 2012, found that the evidence presented to the court was

1 insufficient to determine whether a portion of the attorney fee
2 award was attributable to those claims found to be
3 nondischargeable.

4 The court then received briefing by the parties on the attorney's
5 fee issue and a further hearing was held January 14, 2013.

6 Here, the court amends its October 12, 2012 Memorandum Decision
7 and determines that Defendant's obligation to Plaintiff Zelma
8 Stennis in the amount of \$270,648.18 is nondischargeable.
9

10 A. Background

11 Plaintiff Zelma Stennis filed a lawsuit in Los Angeles County
12 Superior Court against Defendant. Her third amended complaint
13 included causes of action for fraud, violation of Elder Abuse and
14 Dependent Adult Civil Protection Act, conversion, intentional and
15 negligent tortious interference with prospective economic
16 relations, negligence, breach of fiduciary duty, negligent and
17 intentional infliction of emotional distress, injunctive relief,
18 quiet title, cancellation of instrument, declaratory relief/setoff,
19 and injunctive relief.
20

21 In her complaint Plaintiff Zelma Stennis alleged that Defendant,
22 while not a real estate agent or broker, requested that she allow
23 him to find a buyer for her Los Angeles property. For a period of
24 18 months Defendant did not secure a buyer and Plaintiff Zelma
25 Stennis hired a licensed real estate broker. Aside from ordering a
26

1 temporary rental fence at \$115/month for 4 months, Defendant had
2 not improved the property, but placed and recorded a mechanics lien
3 on the property on December 18, 2006.

4 The Superior Court conducted a jury trial. Following trial, the
5 jury returned a verdict in Plaintiff Zelma Stennis' favor; issuing
6 a special verdict on July 22, 2010.

7 The Superior Court further awarded Plaintiff Zelma Stennis
8 attorney fees and costs in the amount of \$213,499.62. Defendant
9 did not appeal the judgment or the fee order.

10 Defendant filed his petition under Chapter 7 on December 13,
11 2010. Plaintiffs timely filed their complaint to determine
12 dischargeability and object to discharge. They subsequently
13 amended it twice. The third amended complaint ("Complaint") was
14 filed December 15, 2011.

15 This court has subject matter jurisdiction of this proceeding
16 under 28 U.S.C. §1334. This is a core proceeding under 28 U.S.C.
17 §157(b)(2)(I).

18 B. Discussion

19 1. Summary Judgment Standard

20 Summary judgment is appropriate when there exists "no genuine
21 issue as to any material fact and the moving party is entitled to
22 judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also* Fed.
23
24
25
26

1 R. Bankr.P. 7056 (establishing that Rule 56 applies to adversary
2 proceedings).

3 The Supreme Court discussed the standards for summary judgment in
4 a trilogy of cases, *Celotex Corporation v. Catrett*, 477 U.S. 317,
5 327 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986),
6 and *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 477
7 U.S. 574 (1986). A fact is material if it might affect the outcome
8 of a proceeding under the governing substantive law. In a motion
9 for summary judgment, the moving party bears the initial burden of
10 persuasion in demonstrating that no issues of material fact exist.
11 *Anderson* 477 U.S. at 255. A genuine issue of material fact exists
12 when the trier of fact could reasonably find for the non-moving
13 party. *Id.* at 248. The court may consider pleadings, depositions,
14 answers to interrogatories and any affidavits. *Celotex* 477 U.S. at
15 323. Where the movant bears the burden of persuasion as to the
16 claim, it must point to evidence in the record that satisfies its
17 claim. *Id.* at 252. In determining whether the movant has met its
18 burden, the court should consider all reasonable inferences in a
19 light most favorable to the non-movant. *Matsuhita* 477 U.S. at 588.

22 2. Plaintiffs' Motion For Summary Judgment
23

24 Plaintiffs claim that they are entitled to summary judgment
25 based on collateral estoppel of the state court judgment obtained
26 by Plaintiff Zelma Stennis.

Collateral Estoppel Standard

The doctrine of collateral estoppel applies in bankruptcy dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). In determining whether a party should be estopped from relitigating an issue decided in a prior state court action, the bankruptcy court must look to that state's law of collateral estoppel. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir.1995).

Under California law, collateral estoppel requires that (1) the issue sought to be precluded from litigation must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001) (citation omitted).

Collateral Estoppel Argument Does Not Apply To Plaintiff Kevin Stennis

The Complaint seeks a determination of non-dischargeability as to costs awarded to Kevin Stennis by the state court. The Superior Court's September 6, 2011 minute order indicates that \$610 in costs

1 were awarded to Kevin Stennis for defending against Defendant's
2 cross-complaint that was voluntarily dismissed on October 14, 2008.

3 Plaintiff Kevin Stennis was not a party to the underlying state
4 court action commenced by Plaintiff Zelma Stennis that constitutes
5 the basis for Plaintiffs' collateral estoppel argument. The fee
6 award in favor of Kevin Stennis relates only to an unsuccessful
7 cross-complaint that was never litigated, but voluntarily dismissed
8 by Defendant.
9

10 Therefore, the facts and issues underlying the fee award are not
11 identical with the issues in this adversary proceeding.

12 Thus, collateral estoppel does not apply to Kevin Stennis'
13 claim; summary judgment is denied as to Kevin Stennis.

14 Hence, the following discussion, focuses only on summary
15 judgment as to Plaintiff Zelma Stennis ("Plaintiff").
16

17 The Elements of a Cause of Action for Intentional Infliction of
18 Emotional Distress Are Substantively Equivalent to the Requirements
19 of §523(a)(6)

20 To determine whether the state court judgment is entitled to
21 collateral estoppel effect, the court must first determine whether
22 the cause of action for intentional infliction of emotional
23 distress is similar enough to the Bankruptcy Code's¹ §523(a)(6)
24

25 ¹ Unless specified otherwise, all chapter and section references are to the
26 Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, and all "Rule" references are to the
Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 standard for collateral estoppel to apply. If collateral estoppel
2 applies, Defendant is precluded from rearguing any material issues
3 of fact, and summary judgment can be entered for Plaintiff.

4 Section 523(a)(6) provides that any debt "for willful and
5 malicious injury by the debtor to another entity or to the property
6 of another entity" is nondischargeable. The type of debts excluded
7 from discharge under §523(a)(6) are limited to intentional tort
8 debts. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998).
9

10 For purposes of §523(a)(6) nondischargeability, the bankruptcy
11 court must find the injury inflicted by the debtor was both
12 "willful" and "malicious." *Matter of Ormsby*, 591 F.3d 1199, 1206
13 (9th Cir. 2010). See also *In re Barboza*, 545 F.3d 702, 711 (9th
14 Cir. 2008).

15 Willful injury within the meaning of §523(a)(6) means
16 "deliberate or intentional." *Kawaauhau v. Geiger*, 523 U.S. 57, 61
17 n.3 (1998). This requirement is met when the creditor shows that
18 the debtor either had a subjective motive to inflict the injury or
19 that the debtor believed the injury was substantially certain to
20 occur as a result of his or her conduct. *In re Jercich*, 238 F.3d
21 1202, 1208 (9th Cir. 2001).
22

23 A "malicious injury" under §523(a)(6) involves a wrongful act;
24 done intentionally; that necessarily causes injury; and that is
25
26

1 committed without just cause or excuse. *Id.* at 1209. See *In re*
2 *Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002).

3 The state court complaint included a cause of action for
4 intentional infliction of emotional distress.

5 Case law supports the application of collateral estoppel to a
6 state court judgment for intentional infliction of emotional
7 distress. See *In re Elder*, 262 B.R. 799, 808 (C.D. Cal. 2001); *In*
8 *re Lee*, 2011 WL 841247 (Bankr. N.D. Cal. Mar. 7, 2011); see also
9 *Robinson v. Louie (In re Louie)*, 213 B.R. 754, 758-59 (Bankr. N.D.
10 Cal. 1997); *Impulsora Del Territorio v. Cecchini (In re Cecchini)*,
11 780 F.2d 1440, 1443 (9th Cir.1986).

12 Under California law, the elements of intentional infliction of
13 emotional distress are "(1) extreme and outrageous conduct by the
14 defendant with the intention of causing, or reckless disregard of
15 the probability of causing, emotional distress; (2) the plaintiff's
16 suffering severe or extreme emotional distress; and (3) actual and
17 proximate causation of the emotional distress by defendant's
18 outrageous conduct." *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th
19 Cir. 2004). (4) The conduct must be "directed at plaintiff, or
20 occur in the presence of a plaintiff of whom defendant is aware."
21 *Christensen v. Superior Court*, 54 Cal.3d 868, 903 (1991) (en banc)
22 (quotations and citations omitted).
23
24
25
26

1 Intentional infliction of emotional distress is a tort under
2 California law. "Tortious conduct under state law is necessarily
3 wrongful." See *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th
4 Cir.2008). Thus, the jury verdict establishes debtor committed a
5 wrongful act.

6 The jury further found that Defendant's conduct was outrageous
7 and he intended to cause Plaintiff emotional distress. The jury
8 concluded that Defendant's conduct was a "substantial factor" in
9 the severe emotional distress Plaintiff suffered. Thus,
10 Defendant's conduct necessarily caused injury.

11 Finally, there was no indication of just cause or excuse. Thus,
12 the issue to be decided under §523(a)(6) is the same as in the
13 former proceeding under intentional infliction of emotional
14 distress.
15

16 Collateral estoppel further requires that a matter was actually
17 litigated and necessarily decided. The Superior Court held a jury
18 trial in the underlying case. The jury's Special Verdict
19 identifies the conclusions it made from the evidence presented. The
20 court concludes on this record that the elements of the §523(a)(6)
21 claim were actually litigated and necessarily decided in the
22 Superior Court.
23

24 The state court judgment is also final and on the merits. A jury
25 found Defendant liable for intentional infliction of emotional
26

1 distress, a judgment was entered against Defendant, and Defendant
2 did not appeal the judgment within the required period. Defendant
3 is the same defendant as in the state court proceeding. Thus, all
4 elements of collateral estoppel are satisfied.

5 Collateral estoppel can be invoked as to the amount of the debt
6 owed by Defendant. See *Sasson v. Sokolof (In re Sasson)*, 424 F.3d
7 864, 872 (9th Cir. 2005). Punitive damages may fall within the
8 scope of "any debts" under §523(a). See *Cohen v. De La Cruz*, 523
9 U.S. 213, 220-21 (1998) (interpreting "any debt for" fraud under
10 §523(a)(2)(A) to mean any liability arising from or on account of
11 debtor's fraud, including a treble damages award for the fraud).

12 The jury found damages against Defendant for intentional
13 infliction of emotional distress in the amount of \$85,000.00,
14 consisting of future non-economic losses and punitive damages of
15 \$8,103.18. The state court entered a judgment for this amount and
16 that judgment is now final. Defendant is therefore precluded from
17 arguing this amount of debt.

18 Plaintiff is entitled to judgment as a matter of law in the
19 amount of \$93,103.18. The debt is nondischargeable under 11 U.S.C.
20 § 523(a)(6).
21
22
23
24
25
26

1 The Elements of a Cause of Action for Intentional
2 Misrepresentation And Concealment Are Substantively Equivalent to
3 the Requirements of §523(a)(2)(A)

4 *Intentional Misrepresentation*

5 Pursuant to §523(a)(2)(A), a monetary debt is nondischargeable
6 to the extent obtained by false pretenses, a false representation,
7 or actual fraud.

8 To establish that the debt is nondischargeable, Plaintiffs must
9 show that (1) the debtor made the representations; (2) at the time
10 he knew they were false; (3) he made them with the intention and
11 purpose of deceiving the creditor; (4) the creditor relied on such
12 representations; and (5) the creditor sustained alleged loss and
13 damage as the proximate result of such representations. *In re*
14 *Diamond*, 285 F.3d 822, 827 (9th Cir. 2002) (citations omitted).

15 Ninth Circuit case law confirms that the elements of fraud under
16 California law match the ones under §523(a)(2)(A). *Younie v. Gonya*
17 (*In re Younie*), 211 B.R. 367, 373-74 (B.A.P. 9th 1997) ("The
18 elements of §523(a)(2)(A) 'mirror the elements of common law fraud'
19 and match those for actual fraud under California law."). *See also*
20 *Baldwin v. Kirkpatrick (In re Baldwin)*, 245 B.R. 131, 134 (B.A.P.
21 9th Cir. 2000).

22 According to the special verdict the jury found the following
23 elements on the state court intentional misrepresentation claim:
24
25
26

1 (1) False representation of an important fact; (2) Defendant knew
2 the representation was false or he made the representation with
3 reckless disregard for its truth; (3) Defendant intended Plaintiff
4 to rely on the representation; (4) Plaintiff reasonably relied on
5 the representation; (5) Plaintiff's reliance on Defendant's
6 representation was a substantial factor in causing harm to her; and
7 (6) Non-economic damages (including physical pain, mental
8 suffering) resulted. In addition, the jury awarded punitive
9 damages.
10

11 Thus, the state court judgment for intentional misrepresentation
12 is sufficiently identical with the issues under §523(a)(2)(A) to
13 establish nondischargeability by collateral estoppel. The amount
14 of \$20,000 is found to be non-dischargeable.
15

16 *Concealment*

17 Plaintiff also relies on the state court judgment for
18 concealment for her collateral estoppel argument.

19 Fraud under §523(a)(2)(A) means actual fraud. The term "actual
20 fraud" was added as a ground for exception from discharge with
21 enactment of the Bankruptcy Code and "[w]hatever doubt there may
22 have been prior to the enactment of the Code that fraud may consist
23 of concealment or intentional nondisclosure as well as affirmative
24 misrepresentations of material facts, is clearly dispelled by the
25 addition of the term 'actual fraud' in §523(a)(2)(A)." *In re*
26

1 *Evans*, 181 B.R. 508, 515 n.6 (Bankr. S.D. Cal. 1995). It is, thus,
2 "well recognized that silence, or the concealment of a material
3 fact, can be the basis of a false impression which creates a
4 misrepresentation actionable under §523(a)(2)(A)." *Id.* at 514-15.
5 See *In re Daquila*, 2011 WL 3300197 (B.A.P. 9th Cir. Feb. 28, 2011)
6 ("A debtor's failure to disclose material facts constitutes a
7 fraudulent omission under § 523(a)(2)(A) if the debtor was under a
8 duty to disclose and possessed an intent to deceive."); *In re*
9 *Miller*, 310 B.R. 185, 196 (Bankr. C.D. Cal. 2004) ("The concealment
10 or omission of material facts that a party has a duty to disclose
11 can support the nondischargeability of a debt on the grounds of
12 actual fraud.").

13
14 To show actual fraud the plaintiff must prove that 1) defendant
15 made a misrepresentation, concealment, or non-disclosure of a
16 material fact; 2) defendant had knowledge that what he was saying
17 was false; 3) defendant intended to induce plaintiff's reliance; 4)
18 plaintiff justifiably relied; and 5) plaintiff suffered damage as a
19 result. *Odorizzi v. Bloomfield School Dist.*, 246 Cal.App.2d 123,
20 128-129 (Cal. Ct. App. 1966); Cal. Civ. Code § 1572.
21

22
23 Here, the jury found that Defendant intentionally failed to
24 disclose an important fact that Plaintiff did not know and could
25 not reasonably have discovered, Defendant intended to deceive her
26 by concealing the fact, Plaintiff relied on Defendant's deception

1 and her reliance was reasonable under the circumstances,
2 defendant's concealment was a substantial factor in causing harm to
3 her, and Plaintiff suffered past non-economic loss (including
4 physical pain/mental suffering) in the amount of \$20,000.

5 Thus, the state court judgment for concealment is sufficiently
6 identical with the issues under §523(a)(2)(A) and the amount of
7 \$20,000 is non-dischargeable as well.

8
9 The Elements of a Cause of Action for Breach of Contract Are Not
10 Substantively Equivalent the requirements of §523(a)(4)

11 Section 523(a)(4) excludes from discharge any debt "for fraud or
12 defalcation while acting in a fiduciary capacity, embezzlement, or
13 larceny."

14 Plaintiff relies on the state court judgment for breach of
15 fiduciary duty to establish collateral estoppel. When the
16 nondischargeability complaint is based on fraud or defalcation in a
17 fiduciary relationship, the creditor must prove that 1) defendant
18 was acting in a fiduciary capacity; and 2) while acting in that
19 capacity, he engaged in fraud or defalcation. *In re Stanifer*, 236
20 B.R. 709, 713 (B.A.P. 9th Cir. 1999).
21

22 For purposes of §523(a)(4), the fiduciary relationship requires
23 (1) an express or technical trust; (2) the trust must exist prior
24 to wrongdoing; (3) state law must clearly define fiduciary duties
25
26

1 and identify trust property; and (4) an identifiable trust res. *In*
2 *re Honkanen*, 446 B.R. 373, 378-80 (B.A.P. 9th Cir. 2011).

3 According to the state court complaint, Defendant - while not a
4 real estate agent or broker - requested that Plaintiff allow him to
5 find a buyer for her Los Angeles property. For a period of 18
6 months Defendant did not secure a buyer and Plaintiff then hired a
7 licensed real estate broker.

8 The jury found that Defendant owed Plaintiff a fiduciary duty as
9 an agent business manager (financial advisor). He breached that
10 fiduciary duty; harming Plaintiff as a result. Defendant's conduct
11 was a substantial factor in causing her harm, and that Plaintiff
12 incurred past non-economic damages in the amount of \$250,000. The
13 jury also awarded punitive damages.

14 The crucial question for this court is whether Defendant's
15 fiduciary status determined to be an agent business
16 manager/financial advisor qualifies as fiduciary under §523(a)(4).
17 In bankruptcy, breach of a fiduciary duty is defined narrowly. The
18 broad definition of fiduciary under state law - "a relationship
19 involving trust, confidence, and good faith - is inapplicable in
20 the dischargeability context." *In re Cantrell*, 329 F.3d 1119, 1125
21 (9th Cir. 2003).
22

23 In a recent case involving a real estate licensee, the Ninth
24 Circuit found: "General fiduciary obligations are not sufficient
25
26

1 to fulfill the fiduciary capacity requirement in the absence of a
2 statutory, express, or technical trust." *In re Honkanen*, 446 B.R.
3 373, 381 (B.A.P. 9th Cir. 2011). Defendant was an unlicensed
4 financial advisor. There is no state law establishing duties or
5 related trust property for financial advisors. Defendant did not
6 hold any property in trust. The state court complaint does not
7 allege that Defendant ever held any property (a trust res) for
8 Plaintiff. The complaint merely stated that Defendant acted "as
9 Plaintiff's agent to sell the property." As stated above, general
10 fiduciary obligations (a relationship involving trust, confidence,
11 and good faith) are not sufficient to fulfill the fiduciary
12 capacity requirement in the absence of a statutory, express, or
13 technical trust. Here, there was no trust due to the lack of a
14 trust res.
15

16
17 In the absence of a trust res, there was no express, technical
18 or statutory trust formed between Defendant and Plaintiff.
19 Consistent with the reasoning and holding of *Honkanen*, Defendant
20 was not acting in a fiduciary capacity as required by §523(a)(4).
21 Accordingly, the Plaintiff's state court judgment against Defendant
22 for breach of fiduciary duty in the amount of \$250,000 is
23 dischargeable.
24
25
26

1 Remaining Claims

2 Except to the extent that certain claims are determined to be
3 nondischargeable herein, Plaintiffs' motion for summary judgment is
4 denied on the basis that collateral estoppel does not establish
5 nondischargeability as to the remaining claims.

6 Allocation of State Court Attorney's Fee Award

7 The court's allocation of the attorney's fees is based on the
8 fees and costs statements submitted by plaintiffs and the
9 declaration of plaintiffs' counsel, who was also the counsel of
10 record in the state court proceeding (docket nos. 152, 153).

11 The court determines that the hourly rates of state court
12 counsels, Mr. Conley and Ms. Hatter, are reasonable and within the
13 range of hourly rates of attorneys in the Los Angeles.
14

15 Based upon the court's review of the fees and costs statements
16 provided, \$131,945 in attorney's fees and \$5,600 in costs relate to
17 nondischargeable claims. Thus, the total fee award of \$137,454 is
18 determined to be nondischargeable in addition to the \$133,103.18
19 previously determined to be nondischargeable.
20

21 3. Defendant's Motion for Summary Judgment

22 As part of his motion for summary judgment Defendant reiterates
23 the arguments he made in his opposition to Plaintiffs' motion for
24 summary judgment.
25
26

1 Defendant argues with respect to §523(a)(2)(A) that Plaintiffs
2 fail to plead fraud with particularity, further that the state
3 court judgment for punitive damages was unsupported by the law, and
4 that Plaintiffs will not be able to produce any evidence to support
5 their claims. Also, Defendant repeatedly makes an argument with
6 respect to the lack of any economic loss by Plaintiff, which the
7 court finds difficult to understand.

8
9 In summary, Defendant is essentially listing several reasons why
10 Plaintiffs will not succeed with their motion. However, he does
11 not submit an argument or a legal basis upon which his summary
12 judgment motion should be granted. The court being unable to find
13 such basis, Defendant's motion for summary judgment is denied.

14 Conclusion

15 For the reasons discussed above, Plaintiff Zelma Stennis is
16 entitled to judgment of a non-dischargeable claim against Defendant
17 in the total amount of \$270,648.18. The court will issue a
18 separate judgment.
19
20
21
22
23
24
25
26

COURT SERVICE LIST

Helaine Hatter
Law Offices of Helaine Hatter
9400 National Blvd. #1
Los Angeles, CA 90034

William Edgar Davis
POB 213
Walnut Creek, CA 94597